BASIN WIDE ISSUE 5

(CONJUNCTIVE ADMINISTRATION GENERAL PROVISIONS)

In Re SRBA
Twin Falls County Civil Case No. 39576
Sub-Case No. 91-0005

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
David B. Shaw, Adjudication Bureau Chief

March 11, 1996

The Director of the Idaho Department of Water Resources submits this report regarding Basin Wide Issue 5 (Conjunctive Administration General Provisions). This report was prepared by Karl J. Dreher, Director, and David B. Shaw, Adjudication Bureau Chief. Mr. Shaw is the director's designee who will be available at the hearing in this subcase. Mr. Shaw's *vitae* is attached to this report.

WHY IS IT NECESSARY FOR THE COURT TO INCLUDE GENERAL PROVISION 1 IN THE BASIN 36 REPORT AND GENERAL PROVISION 3 IN THE BASIN 34 REPORT AS TO CONJUNCTIVE ADMINISTRATION TO ENABLE THE DIRECTOR TO LAWFULLY ADMINISTER WATER RIGHTS AS DECREED?

The fundamental issue is the extent to which the decree in the SRBA will address the conjunctive administration of water rights -- in other words, the extent to which water rights from hydrologically related sources will be administered as if the water rights were from a single source. The answer necessarily involves choosing an appropriate point on a spectrum of choices. At one end of the spectrum, the decree would make no provision as to conjunctive administration. However, by describing the local water source in the description of the individual water right, the decree necessarily makes some provision as to conjunctive administration, since all rights described as having the same source would be conjunctively administered. Thus, if an appropriator from a stream with a senior priority were not receiving water, junior appropriators on the same stream would be subject to curtailment unless the junior could show that curtailment would not make water available to the senior in usable quantities.[1]

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[1] *Martiny v. Wells*, 91 Idaho 215, 419 P.2d 470 (1966).

At the other end of the spectrum, the decree would determine the relationship of each water right in the Snake River basin to each other water right in the basin. Thus, if a senior appropriator on the Snake River were not receiving water, the decree would determine whether (and which) junior appropriators would be subject to curtailment on each tributary of the Snake River, each aquifer tributary to the Snake River, and each aquifer tributary to each tributary to the Snake River. To choose a point at this end of the spectrum is not feasible, because hydrologic data is not sufficient at this time to accurately make each of those determinations. It is not practical, because undertaking such a task as part of the SRBA would ensure that the SRBA would never end. It is not necessary, because controversies do not exist at the current time which presently require such extensive determinations.

Resolving this fundamental issue requires recognition of the reality that administration of water rights -- the distribution of water in accordance with priority in times of shortage -- is a complex and dynamic process.

1. Both water demand and water supply are constantly changing. Irrigators, for example, may divert water only at certain times depending on rotation practices or other factors, which substantially affects the quantity demanded at any given time. Stream flows are the most notable example of fluctuating supply, subject to change annually, within the annual water cycle, or even within a single day depending on weather conditions.

2. Conjunctive administration depends on detailed data, but adequate data is often lacking, and both data and technology are evolving and improving. Ground water modeling and computerized water accounting are two examples of recent technologies used to compile and analyze data for the administration of water rights, and implementation of both are ongoing in Idaho, in selected areas.

3. Administration of water rights, particularly conjunctive administration, requires policy decision-making. Frequently, application of the laws governing conjunctive administration do not provide clear answers to questions regarding conjunctive administration, because the laws governing conjunctive administration are based on policies which can conflict with each other. Both the laws and the policies of administration of water rights, particularly in the area of conjunctive administration of surface and groundwater, are evolving. Although conjunctive administration of surface and ground water is not a new idea, actual implementation of conjunctive administration is a new frontier in the administration of water rights.[2]

The fundamental question thus becomes, how is an appropriate point along the spectrum to be chosen in light of these realities? In making its recommendations, IDWR placed emphasis on the following factors.

1. Is there is a significant hydrologic connection, such that use by junior appropriators from one local source raises the potential for material injury to senior appropriators on the other local source? There is necessarily a hydrologic connection between all sources within the Snake River Basin, since they are all part of the same basin. To warrant conjunctive administration, however, the connection must be of sufficient significance to raise the potential for material injury.[3] "Significant connection" is therefore a threshold criteria in determining whether provisions as to conjunctive administration are appropriate.

2. Is there a current controversy which creates a current need for conjunctive administration to ensure that all water rights are protected and that all water uses are allowed the full benefit of their water rights? Absent such controversy, debates as to conjunctive administration, interesting though they may be, are merely theoretical and are at most anticipatory of potential future controversies. "Current controversy" is therefore a threshold criteria in determining whether provisions as to conjunctive administration are necessary.

With respect to general provision 1 in the Basin 36 report, and general provision 3 in the Basin 34 report, the director concluded that these criteria are clearly met. The

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[2] Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface and Groundwater Under the Appropriation Doctrine,* 22 Land and Water Law Review 63 (1987).

[3] *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho , 154 P.2d 507 (1954).

existence of both a significant connection and a current controversy were demonstrated, in Basin 36 by the proceedings in the *Musser*[4] case, and in Basin 34 by the proceedings on interim administration. IDWR therefore included a general provision in the Basin 36 report, which recognizes the "significant connection" between ground and surface water in Basin 36, and between Basin 36 and the Snake River. IDWR also included a general provision in the Basin 34 report which recognized the "significant connection" between ground and surface water in Basin 34. With respect to the administration of basins 34 and 57 relative to the Snake River, IDWR concluded that these criteria were not met, and included explanatory material in the director's report that summarized the information currently available as to the nature of the connection between these sources.

Although IDWR recommended including a general provision that establishes the existence of the significant connection, IDWR did not include in that general provision language describing the mechanics of conjunctive administration. First, conjunctive administration of water rights is already addressed by the laws of the state, including rules promulgated by IDWR pursuant to those laws. Second, and more importantly, actual administration will require particularized determinations as to the actual impact of junior diversions upon the senior appropriators that are calling for distribution, which will be dependent upon variables such as the water demands and water supply at the time a call for distribution by IDWR is made, as well as upon hydrologic information that will continue

[4] *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

to evolve over time. These particularized determinations based on temporal variables are not suited to a general provision to be permanently decreed.

In determining whether IDWR's choice was both necessary and appropriate, perhaps the most important factor is the effect that these general provisions (or the lack thereof) will have on the future administration of water rights. The principal effect of these general provisions is to establish, both as a matter of fact and as a matter of law, that junior groundwater appropriations in the identified area, as a class, have the potential to materially impact senior surface appropriations in the identified area. Thus, in subsequent administrative proceedings, the senior surface water user does not have the initial burden to establish a significant connection, and it is left to individual junior ground water appropriators to establish that their particular use does not cause injury. More importantly, it does so in a proceeding where all members of that class who may wish to participate in the resolution of any dispute as to that determination are already present before the court. Further particularized determinations will then be left to administrative proceedings tailored to resolving the particularized issues.

State of Idaho)
) ss.
County of Ada)

David B. Shaw, being first duly sworn, upon oath, deposes and says:

That I am the Adjudication Bureau Chief for IDWR, that I have read the foregoing report, know its contents, and that the statements contained therein are true to the best of my knowledge and belief.

David B. Shaw

Subscribed and sworn to before me this 10th day of March, 1996.

L. Sherman
Notary Public for Idaho
Residing at: Boise ID
My commission expires:
11-14-1998

DAVID B. SHAW
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EDUCATION

Bachelor of Science in Agricultural Engineering, University of Idaho, 1966

Master of Science in Agricultural Engineering, University of Idaho, 1972

EXPERIENCE

Water Rights Adjudication Bureau Chief, Idaho Department of Water Resources, Boise, ID, 1985 - present
Responsibilities include management and supervision of IDWR's adjudication functions in the SRBA, including the investigation of claims and preparation of Director's Reports.

Served as co-chair of the state, Indian, federal and private technical advisory committee to the negotiating committee for the Shoshone-Bannock reserved water right determination which resulted in The 1990 Fort Hall Indian Water Right Agreement.

Lead responsibility for preparation of water distribution rules for the Big Lost River Basin, the first such rules developed and adopted in Idaho.

Western Region Manager, Idaho Department of Water Resources, 1978-1985
Responsibilities included management and supervision of IDWR's adjudication functions in IDWR's Western Region, which included the Payette River and Reynolds Creek Adjudications; supervision of IDWR's water allocation functions in IDWR's Western Region, including processing of applications for water right permits and transfers and, water distribution.

Technical Support Section Manager, Idaho Department of Water Resources, 1974-1978
Responsibilities included management of staff which provided technical support in the areas of engineering, economics, soils, geohydrology, geology, geothermal, remote sensing and computer operations. Provided technical support for completion of the first State Water Plan. After completion of the state water plan, managed the Water Allocation section responsible for water right processing, water distribution and adjudications.

Assistant Professor - College of Engineering, Department of General Engineering, University of Idaho 1968-1973
Courses taught: Engineering Graphics, Slide Rule, Engineering Science (Statics & Dynamics), Introduction to Fortran Programming and Advanced Fortran Programming, Freshman Engineering Design.

RELATED EXPERIENCE/SKILLS

Licensed Professional Engineer and Land Surveyor in Idaho

Publications:
"Problem Oriented Languages - Statistics and Hydrology," Molnau and Shaw, COED Transactions, 1974
"Why Use Problem Oriented Languages," Shaw and Molnau, ASAE Transactions, 1975.

Raised on an irrigated farm and since 1982 have operated and managed an irrigated orchard in the Emmett Valley.